

**United States Department of Labor
Employees' Compensation Appeals Board**

N.G., Appellant

and

U.S. POSTAL SERVICE, BLUE LAGOON
BRANCH, Miami, FL, Employer

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**Docket No. 07-689
Issued: July 23, 2007**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2007 appellant, through counsel, filed a timely appeal from an October 18, 2006 decision of the Office of Workers' Compensation Programs denying her emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On May 25, 2005 appellant, then a 44-year-old postal window clerk, filed both traumatic injury and occupational disease claims alleging an emotional condition due to her employment. In the traumatic injury claim, she alleged that on April 24, 2006 she sustained an emotional condition due to hostile and abusive behavior/treatment by Larry Alfonso, station manager. In the occupational disease claim, appellant alleged that her depression and fear were due to

abusiveness and hostility by Mr. Alfonso. She stopped work on April 25, 2005 and has not returned.¹

In a May 27, 2005 attending physician's report (Form CA-20), Dr. Beatriz Liliane Villafane, a treating psychiatrist, diagnosed depressive disorder since February 2005 due to problems with her supervisor at work. She checked "yes" to the question of whether the condition had been caused or aggravated by her employment.

On June 6, 2005 the Office received appellant's February 4 and May 9, 2005 statements and Mr. Alfonso's June 2, 2005 statement. Appellant related an incident with a customer on February 4, 2005 and Mr. Alfonso's screaming at her. The incident involved a customer asking the person in the window next to her if the person spoke Spanish. Appellant stated that she started to giggle, finished with her customer and left for lunch. At this point, the customer "went to Larry and started pointing at me and yelling in Spanish." Once the customer left, appellant alleged that Mr. Alfonso started to tell her that she had been rude to the customer and screamed at her. She alleged that she was afraid to move while Mr. Alfonso was screaming at her as he stated "this was an official discussion." Lastly, appellant stated that a customer told her supervisor that all employees should speak Spanish as "this was a Latin community and Larry's response was 'I'm working on it!'"

In his June 2, 2005 statement, Mr. Alfonso stated that appellant had been addressed "for two instances in which she had arguments with customers in the lobby." The incidents occurred on January 21 and February 4, 2005. Mr. Alfonso noted that during the period January 24 to April 26, appellant "has been on vacation leave or sick leave for a previous condition for over thirty[-]five days."

In a May 9, 2005 statement, appellant alleged that Mr. Alfonso continually harassed her and subjected her to disparaging and hostile treatment. She attributed her migraines, depression, anxiety, fear for her well-being and safety due to Mr. Alfonso's "continual actions, words and demeanor." Appellant noted two grievances had been filed by the employees against Mr. Alfonso.

On May 25, 2005 appellant filed a claim for compensation (Form CA-7) for lost wages beginning April 26, 2005.

The employing establishment submitted a June 8, 2005 investigative memorandum with exhibits regarding appellant by Ingrid Petrakis, postal inspector. In a June 3, 2005 memorandum of interview with Mr. Alfonso, Ms. Petrakis noted that he denied screaming or yelling at appellant and that it was his duty to address work problems and direct employees. Mr. Alfonso informed Ms. Petrakis that appellant "has had numerous performance issues which include being disrespectful to customers and poor attendance." On June 6, 2005 Ms. Petrakis interviewed Josie Moretti, workplace improvement analyst for the employing establishment. Ms. Moretti related investigating appellant's claim of a hostile work environment and finding that "no credible threat

¹ The employing establishment approved appellant's request for leave under the Family Medical Leave Act (FMLA) for the period April 26 to July 20, 2005.

could be substantiated.” She noted that Mr. Alfonso’s “regular tone of voice is loud and may be misinterpreted by others.”

In a June 13, 2005 letter, the Office informed appellant that the evidence of record was insufficient to support her claim. It advised her of the medical and factual evidence required to support her claim and gave her 30 days to submit the requested evidence.

In response appellant submitted additional medical and factual evidence including a report dated June 23, 2005 and a June 2, 2005 health care certification for the FMLA by Dr. Villafane and an April 14, 2005 statement and several letters written in April, May and June 2005 by Maria A. Andrés, a coworker, a March 22, 2005 statement, an undated statement by Sharon Rush, a coworker, a statement by Claude Caidor, a coworker, a May 27, 2005 settlement agreement of mediation between Ms. Andrés and Mr. Alfonso and her statement dated June 18, 2005.

In her statement, Ms. Rush alleged that she was being discriminated against based on her sex and race by Mr. Alfonso. She proceeded to describe incidents involving her and Mr. Alfonso. Ms. Rush made no mention of appellant in her statement.

In the April 14, 2005 statement, Ms. Andrés related her problems with Mr. Alfonso and the preferential treatment he accords Jose Lopez, a coworker. She opined that Mr. Alfonso “has no people skills, looses (sic) his temper, screams at his employees and is incapable of being fair to his employees regardless of sex.” Ms. Andrés does not address appellant’s allegations in her April 14 and 15 and May 9, 18 and 20, 2005 letters. She alleged that Mr. Alfonso created a hostile work environment with his abusive treatment of her and his mistreatment of her coworkers. Ms. Andrés, in her May 22, 2005 letter, responded to Mr. Alfonso regarding her annual leave usage. In a June 17, 2005 letter, she details what she considers is a hostile work environment created by Mr. Alfonso.

In a March 22, 2005 statement, Ms. Caidor stated that on February 4, 2005 she was waiting on a customer who asked if she spoke Spanish and if there was an employee who spoke Spanish. She noted that appellant giggled when she informed the customer that there was no Spanish speaking clerk. After Ms. Caidor had finished with the customer, she noted that he went directly to speak to Mr. Alfonso. She related the customer was talking in a very loud voice and pointing to appellant saying the “words “‘GRINGA’ and ‘PUERTA.’” (Emphasis in the original.) Once the customer had finished talking with Mr. Alfonso, he requested that appellant come to see him. Ms. Caidor indicated that she could hear Mr. Alfonso yelling at appellant due to the thin walls. When she saw Mr. Alfonso later, he informed her that this was the second complaint that week he had about appellant. In concluding, she stated that Mr. Alfonso’s reprimand of appellant “was completely in-accurate (sic) and totally out of context with the situation.”

In the June 2, 2005 medical certification, Dr. Villafane diagnosed depression and anxiety which was “triggered and exacerbated by [a] [February]/[20]05 relationship with supervisor.” She indicated that appellant was totally disabled for an unknown period of time. On June 23, 2005 Dr. Villafane diagnosed major depressive disorder and job-related problems. She related that appellant’s anxiety and depression “apparently started in February 2005, after a work-related

incident involving [her] supervisor.” Dr. Villafane noted that appellant had no symptoms prior to the February 2005 incident.

In her June 18, 2005 statement, appellant noted that Mr. Alfonso’s abusive behavior has caused her depression, anxiety, migraines and fear for her well being and safety. She noted that following the February 4, 2005 incident Mr. Alfonso began harassing Ms. Andrés and Ms. Caidor. Appellant alleged that the harassment of Ms. Caidor was due to her defending appellant regarding the February 4, 2005 incident and that Ms. Andrés was harassed due to their friendship. She alleged that Mr. Alfonso’s harassment and hostile actions grew worse following the February 4, 2005 incident. Appellant relates that just thinking about Mr. Alfonso makes her nauseous. She stated that all was well with her and her work environment prior to the arrival of Mr. Alfonso as manager.

By decision dated July 15, 2006, the Office denied appellant’s traumatic injury and occupational disease claims on the grounds that she failed to establish any compensable factors of employment. The Office found that the incident on February 4, 2005 occurred when Mr. Alfonso disciplined appellant and provided counseling for an argument with a customer. The Office also found the record devoid of any evidence supporting her allegation that Mr. Alfonso was harassing her.

Subsequent to the decision, the Office received a July 14, 2005 letter from appellant. Appellant noted that she filed two Equal Employment Opportunity (EEO) Commission complaints against Mr. Alfonso. She alleged that Mr. Alfonso’s letter informing her to report to duty and a letter charging her with being absent without leave was a continuation of his harassment of her.

Appellant requested reconsideration on September 7, 2005. She submitted previously submitted evidence as well as new evidence in support of her claim. The new evidence included an August 16, 2005 report by Sanford Mintz, Ph.D., and an August 1, 2005 letter from appellant reiterating problems she and others had with Mr. Alfonso. Appellant also submitted copies of grievance and evidence regarding approval of her FMLA request.

On March 25, 2005 Lori M. Costa, manager customer service, and Omar Hechavarria noted that a meeting was held on February 28, 2005 to discuss “an allegation of harassment and discrimination at the [employing establishment].” The parties agreed “that all employees will be treated with dignity and respect.” Appellant noted that Mr. Hechavarria addressed the letter regarding the settlement. She indicated that the letter regarding the settlement of the harassment grievance was addressed to her as she “originally filed this grievance and then it became a class action.” The record also contains copies of a class grievance settled on September 13, 2005 regarding absence of April 13, 2005 to be considered scheduled leave.

In the August 1, 2005 letter, appellant alleged that Mr. Alfonso was being protected by Jesus Galvez, postmaster, and that Ms. Petrakis had been Mr. Galvez’s secretary. She stated that Ms. Petrakis failed to interview the three employees alleging that Mr. Alfonso harassed them and opined that her investigation was biased. Appellant reiterated what occurred on February 4, 2005 and how Mr. Alfonso screamed and yelled at her. She noted her disagreement with Mr. Alfonso’s allegation that she had many performance and attendance problems. Next,

appellant noted the preferential treatment Mr. Alfonso accorded to Jose Lopez, who was the only male clerk.

In an August 16, 2005 report, Dr. Mintz noted that he had been treating appellant since June 7, 2005. He related that on February 4, 2005 Mr. Alfonso “verbally assaulted her in front of customers and coworkers.” Since the February 4, 2005 incident with Mr. Alfonso, appellant “has experienced a heightened level of anxiety.” Dr. Mintz diagnosed major depressive disorder and concluded that she was currently totally disabled.

On February 13, 2006 the Office denied appellant’s request for reconsideration.

On July 13, 2006 appellant requested reconsideration and submitted additional medical and factual evidence in support of her request. She alleged that Ms. Petrakis did not perform a thorough investigation and omitted pertinent information. The evidence included treatment notes for the period January 22 to May 28, 2004 by Dr. Norman Moskowitz, a treating Board-certified orthopedic surgeon; a July 26 2006 report by Dr. Mintz; a December 21, 2005 statement by Calixto Oria, a coworker; a July 10, 2006 email from Carmen Gil, Mr. Oria’s girlfriend regarding Mr. Alfonso’s rude and unprofessional behavior; appellant’s letters dated July 11, 12 and 13, 2006; and an undated witness statement which appellant and her coworkers signed.²

In an undated witness statement, appellant and seven coworkers signed a statement regarding Mr. Alfonso’s behavior. They alleged that they witnessed Mr. Alfonso losing his temper and being out of control, screaming, yelling, harassing employees, being vindictive, trembling with anger, eyes glazed over with anger and veins bulging from forehead/neck while screaming and yelling, demeaning employees and mismanagement.

Mr. Oria, in his December 21, 2005 statement, described Mr. Alfonso’s discriminatory behavior towards him.

In a July 12, 2005 letter, appellant alleged that Mr. Alfonso’s harassment began because he instructed her to speak Spanish and she refused.

Appellant, in a July 13, 2005 letter, alleged that Mr. Alfonso’s harassment of her began in January 2006 when he stated that all of his clerks had to speak Spanish and she disagreed. Next, she noted the February 4, 2005 incident with a Hispanic customer and Mr. Alfonso’s yelling and screaming at her. Subsequent to February 4, 2005, appellant alleged that she was subjected to daily harassment by Mr. Alfonso which included denying sick leave requests and charging her with being absent without leave. Next, she related Mr. Alfonso arguing with customers dissatisfied with Mr. Lopez’s behavior. In concluding, she alleged that Mr. Alfonso is vindictive and employees are afraid of him.

² The names of the coworkers are Ms. Andrés, Mr. Caidor, David Alonso, Victor Crespo, Jr., Maria Falcon, Osvaldo Hernandez, Jr., Ross Williams, Mr. Oria and Ms. Gil.

By decision dated October 18, 2006, the Office denied appellant's request for modification.³

LEGAL PRECEDENT

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,⁵ the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.⁶ There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.⁷ When an employee experiences emotional stress in carrying out his employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from an emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.⁸ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁹

In emotional condition claims, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered. If a claimant does implicate a factor of employment, the Office should then determine whether the

³ The Board notes that, following the October 18, 2006 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁵ 28 ECAB 125 (1976).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ See *Robert W. Johns*, 51 ECAB 137 (1999).

⁸ *Lillian Cutler*, *supra* note 5.

⁹ *Kim Nguyen*, 53 ECAB 127 (2001).

evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁰

As a general rule, an employee's emotional reaction to administrative or personnel actions taken by the employing establishment is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.¹¹ An administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.¹² An employee's frustration from not being permitted to work in a particular environment or to hold a particular position is not compensable.¹³ Similarly, an employee's dissatisfaction with perceived poor management is not compensable under the Act.¹⁴

For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his allegations with probative and reliable evidence.¹⁵

ANALYSIS

Appellant made general allegations of harassment and a hostile work environment caused by her supervisor, Mr. Alfonso. The perception of harassment or mistreatment is not sufficient to establish a compensable work factor. There must be probative and reliable evidence in support of the allegation.¹⁶

Appellant alleged that she was subjected to harassment and a hostile work environment caused by Mr. Alfonso. She contended that the harassment began following her refusal of his instruction to learn Spanish in January 2005. The perception of harassment or mistreatment is not sufficient to establish a compensable work factor. There must be probative and reliable

¹⁰ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹¹ *Felix Flecha*, 52 ECAB 268 (2001).

¹² *Kim Nguyen*, 53 ECAB 127 (2001).

¹³ *Barbara J. Latham*, 53 ECAB 316 (2002).

¹⁴ *Robert Breeden*, 57 ECAB ____ (Docket No. 06-734, issued June 16, 2006).

¹⁵ *James E. Norris*, 52 ECAB 93 (2000)

¹⁶ See *Beverly R. Jones*, 55 ECAB 411 (2004). In evaluating workers' compensation claims, the term harassment is synonymous with a persistent disturbance, torment or persecution, *i.e.*, mistreatment by coemployees or coworkers.

evidence in support of the allegation.¹⁷ The evidence of record does not contain probative and reliable evidence sufficient to establish harassment or a hostile work environment. There are, for example, no findings by the EEO Commission or other administrative agencies on the issue.¹⁸ The grievances submitted by appellant are insufficient to establish either harassment or a hostile work environment. The witness statements and the documents from coworkers made allegations of harassment by Mr. Alfonso towards them, but do not provide specific examples of harassment involving appellant. These statements by Ms. Andrés, Ms. Rush, Mr. Oria and Ms. Gil describe incidents they have had with Mr. Alfonso, but do not mention any incidents pertaining to appellant and Mr. Alfonso. In the undated statement signed by appellant and seven coworkers, they allege witnessing Mr. Alfonso losing his temper and being out of control, screaming, yelling, harassing employees, being vindictive, trembling with anger, eyes glazed over with anger and veins bulging from forehead/neck while screaming and yelling, demeaning employees and mismanagement. However, this statement is insufficient as these are general perceptions by appellant and her coworkers without describing in detail specific incidents. They merely note that they have witnessed the described behavior by Mr. Alfonso. No mention is made of when or where the individuals signing the statement were allegedly subjected to this behavior. Moreover, any alleged harassment or hostile behavior by Mr. Alfonso towards appellant's coworkers does not establish that appellant was subjected to the same harassment and hostile behavior. Furthermore, the employing establishment provided a June 8, 2005 investigative memorandum by Ms. Petrakis, postal inspector, finding the evidence insufficient to support appellant's allegations of a hostile work environment and no credible evidence of any threats made by Mr. Alfonso. While appellant has alleged bias by Ms. Petrakis and Ms. Moretti, she has submitted no supporting factual evidence supporting a bias. Allegations alone are insufficient to establish a factual basis and thus appellant has failed to show that the investigative report was biased.¹⁹ The Board has long held that mere perceptions of harassment or discrimination are not compensable.²⁰ Thus, appellant has not established a compensable factor with respect to harassment or a hostile work environment.

The record contains copies of two grievance which were settled on March 25 and September 13, 2005. Neither grievance references appellant as a grievant. The March 25, 2005 grievance noted that a meeting was held on February 28, 2005 to discuss "an allegation of harassment and discrimination at the [employing establishment]." The parties agreed "that all employees will be treated with dignity and respect." This is not an admission of guilt or wrongdoing on the part of the employing establishment. The record also contains copies of a class grievance involving settled on September 13, 2005. The agreements do not describe the specific subject matter of the settled grievances with specificity nor do they admit any

¹⁷ *Ronald K. Jablanski*, 56 ECAB ____ (Docket No. 05-482, issued July 13, 2005) (A claimant must establish a factual basis for his or her allegations with probative and reliable evidence).

¹⁸ Such evidence, while not determinative, may constitute substantial evidence regarding a compensable work factor. *See Walter Asberry, Jr.*, 36 ECAB 686 (1985)

¹⁹ *L.S.*, 58 ECAB ____ (Docket No. 06-1808, issued December 29, 2006); *Pamela D. Casey*, 57 ECAB ____ (Docket No. 05-1768, issued December 13, 2005).

²⁰ *L.S.*, *supra* note 19.

wrongdoing on the part of the employing establishment.²¹ Thus, the grievances submitted by appellant are insufficient to establish a hostile work environment as a compensable factor of employment.

Appellant also alleged that Mr. Alfonso yelled at her on February 4, 2005 following an incident with a customer who was dissatisfied with her giggling at a comment made by a coworker who was serving him. She submitted statements from coworkers who noted that on February 4, 2005 Mr. Alfonso yelled at her, not every statement uttered in the workplace will give rise to coverage under the Act and a raised voice in the course of a conversation does not in itself warrant a finding of verbal abuse.²² The evidence supports that Mr. Alfonso raised his voice on February 4, 2005. This factual scenario, however, does not rise to the level of error or verbal abuse.²³ There is no evidence that Mr. Alfonso's actions were unwarranted.²⁴ Thus, the Board finds that the February 4, 2005 conversation is not a compensable factor of employment.

Based on the evidence of record, appellant has not substantiated a compensable work factor. Since she has not established a compensable work factor, the Board will not address the medical evidence.²⁵

CONCLUSION

The Board finds that appellant has not established an emotional condition in the performance of duty.

²¹ *D.L.*, 58 ECAB ____ (Docket No. 06-2018, issued December 12, 2006) (the Board has held that grievances and EEO complaints, by themselves, do not establish wrongdoing by an employing establishment).

²² *Karen K. Levene*, 54 ECAB 671 (2003).

²³ *Id.*

²⁴ *See Carolyn S. Philpott*, 51 ECAB 175 (1999).

²⁵ *T.G.*, 58 ECAB ____ (Docket No. 06-1411, issued November 28, 2006); *D.L.*, *supra* note 21; *Margaret S. Krzycki*, 43 ECAB 496 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 18, 2006 is affirmed.

Issued: July 23, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board